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In the Supreme Court of the United States

OCTOBER TERM, 1974

FREDNA MADISON AND ROGER MADISON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that they were entrapped, that they were entitled to a missing witness instruction, and that the district court improperly denied them a continuance to obtain counsel.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were each convicted of two counts of distribution of heroin and one count of possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner

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[1]One count charging distribution of methamphetamine was dismissed at the close of the government's case.

Roger Madison was sentenced to concurrent terms of eight years' imprisonment on each count of the indictment, to be followed by a three-year special parole term. Petitioner Fredna Madison was given a five-year suspended sentence and placed on unsupervised probation. The court of appeals affirmed *per curiam* (Pet. 23-24).

On December 8, 1972, Drug Enforcement Administration agents Gerald Musiello and Thomas Sheehan were introduced to petitioner Roger Madison by government informant Rebecca Burley, following a phone call from Burley informing Madison that "his customers were ready and waiting" (Tr. 9).[2] Petitioner Roger Madison and Musiello discussed a possible heroin purchase. Musiello expressed an interest in purchasing drugs from Madison on a continuing basis and Madison responded that he could deliver high quality drugs on a bi-weekly basis. Madison also assured Musiello that he had been dealing with "his people" for years and that security for the sales was guaranteed (Tr. 10-11). Madison then telephoned to arrange for delivery of the heroin. Petitioner Fredna Madison thereafter arrived with the heroin, which petitioner Roger Madison handed over to Musiello in exchange for $1,400 (Tr. 11-14).

Petitioner Roger Madison and Sheehan met on December 12, 1972, at which time Sheehan complained about the quality of the earlier heroin and petitioner, expressing surprise, offered to provide a sample of higher quality heroin before any further sales (Tr. 23-25). Madison subsequently told Sheehan that he had been dealing with the same sources of supply for "seven or eight years" and commented that "[y]ou will run out of money before my man runs out of heroin"(Tr. 26-27). Madison also told Sheehan

[2]"Tr." refers to the one-volume transcript of the trial on May 10, 1973.

that "although he dealt in heroin, he was a connoisseur of cocaine" and could arrange for a cocaine sale if Sheehan were interested (Tr. 27). Madison then gave Sheehan a small plastic packet of heroin (Tr. 29-30), and reiterated his agreement to furnish two-ounce quantities of heroin on a regular basis to Sheehan and Musiello (Tr. 29).

On February 22, 1973, Sheehan arranged with petitioner Roger Madison to purchase two ounces of methamphetamine for $2,500 (Tr. 30). On March 1, Sheehan and agent Andrew Sherbine met with Madison to consummate the purchase. Madison told Sheehan that he had received the drugs "directly from his man," that he had not diluted them and that they were of good quality (Tr. 30, 32). After about five minutes petitioner Fredna Madison arrived with two plastic bags containing methamphetamine. Petitioner Roger Madison then handed the drugs to Sheehan (Tr. 32-33). Shortly thereafter, petitioners were arrested (Tr. 34, 45).

At trial, petitioner Roger Madison testified in his own defense. He admitted delivering the heroin and the methamphetamine, but stated that all the drugs had been given to him by the informant, Rebecca Burley (Tr. 51-52). Madison testified that Burley had asked him to sell drugs on her behalf to friends "Tom" and "Jerry," since "Jerry" refused to deal with a woman and would only trust a black male (Tr. 50-51). Burley told him that if he made the deal for her that he could have a substantial profit (Tr. 51). Madison admitted that he readily agreed to sell the drugs because he wanted the money (Tr. 62-63). Madison denied any previous involvement with drugs and said that his statements to the agents relating to the extensive drug dealings and connections were lies designed to impress them (Tr. 51, 54, 59).

1. a. Petitioners contend (Pet. 10-16) that the testimony of petitioner Roger Madison that he had received the narcotics he sold to the agents from a government informant established that they were entrapped as a matter of law. Even assuming, *arguendo*, that petitioners would have been entrapped had they received the narcotics from the informant, there was ample evidence from which the jury could have concluded that petitioners did not receive the narcotics from the informant, including Roger Madison's statements to the government agents relating to his extensive drug dealings and connections.

b. Petitioners also contend (*ibid.*) that the court should have instructed the jury that if the jury found that the narcotics sold by petitioners were supplied by the government informant, they would be entitled to an acquittal. Petitioners rely for this proposition upon *United States* v. *Bueno*, 447 F.2d 903 (C.A. 5), a case decided prior to this Court's decision in *United States* v. *Russell*, 411 U.S. 423. In *Bueno*, the Fifth Circuit held that entrapment is established when the government supplies the contraband that the defendant is charged with subsequently selling to government agents.

The question of the continuing vitality of *Bueno* in the wake of this Court's decision in *United States* v. *Russell*, *supra*, is currently pending before this Court in *Hampton* v. *United States*, No. 74-5822, certiorari granted, March 31, 1975. The Court therefore may wish to hold this petition pending its disposition in *Hampton*.[3]

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[3]Contrary to petitioners' contention, the instant case does not present the additional question whether, once the *Bueno* defense is asserted, the government then must come forward with some evidence rebutting the defense. Here, as we have shown, there was ample evidence from which the jury could have concluded that petitioners had not received the contraband from the government.

2. Petitioners also contend (Pet. 16-19) that the trial court's instructions to the jury improperly shifted the burden of proof to the petitioners by their failure to state that inferences adverse to the government could be drawn from the government's failure to produce the informant. A missing witness instruction is not necessary, however, where the informant's identity is known to the defendant prior to trial, and where the defendant fully is aware of her location. See *United States* v. *Kenney*, 500 F.2d 39 (C.A. 4). Here, petitioner Roger Madison knew the informant Rebecca Burley. He admitted visiting her at her home in the District of Columbia on several occasions (Tr. 67-68). The record reveals no pretrial motions by petitioners, requesting the informant's identity or address. Petitioners do not show, nor do they contend, that they attempted and failed to locate her prior to trial. In these circumstances, the district court did not abuse its discretion by failing to give a missing witness instruction.[4]

3. Finally, petitioners contend (Pet. 19-21) that they were denied their Sixth Amendment right to counsel by the court's refusal to grant them a three to four-week continuance.

Following their arrest, petitioners retained Herbert Bass of Philadelphia, Pennsylvania, to represent them. Bass arranged for J. Ronald Lynch, of Alexandria, Virginia, to be local counsel. Bass never filed any pleadings or appearance in this case, nor did he personally contact the court or request a continuance. Approximately ten days prior to trial, Bass asked Lynch to investigate the possibility of obtaining a continuance, since Bass was experiencing some health problems. Bass made no attempt personally to advise the court of his situation.

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[4]Petitioners also contend that because there was no evidence that petitioners had any predisposition to commit the offense, the trial court erred in instructing the jury on the question of predisposition. As we have pointed out, however, there was evidence from which the jury could have concluded that petitioners were predisposed to commit the crime.

After Lynch advised the court of the potential need for a continuance, the court asked Lynch to obtain certification from Bass that he was incapable of continuing law practice during this period. Bass would not so certify (Hearing Tr. 3-4). The evening before trial was scheduled to commence, Bass informed Lynch that he would not appear.

Petitioners do not allege that they had ineffective assistance of counsel during trial. Under these circumstances, the district court acted within its discretion in denying a continuance. *Ungar* v. *Sarafite*, 376 U.S. 575, 589.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.